

Supreme Court, U. S.

FILED

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MICHAEL R. DAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. **78-771**

JOHN F. QUINN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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JOHN F. QUINN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**  
\_\_\_\_\_

The Petitioner, JOHN F. QUINN, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 15, 1978. A Petition for Rehearing and a Suggestion for Rehearing En Banc was denied on October 10, 1978.

**OPINION BELOW**

The opinions of the United States Court of Appeals for the Ninth Circuit, not yet reported, appear in the Appendix hereto.

## **JURISDICTION**

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## **QUESTION PRESENTED FOR REVIEW**

1. Whether the Court of Appeals was correct in allowing the Government to use projections supplied by the Internal Revenue Service which were arbitrary, capricious and without foundation in fact.

## **CONSTITUTIONAL PROVISION INVOLVED**

Petitioner respectfully submits that constitutional issues of law are specifically at issue herein. The constitutional question involved is whether the Government may utilize in its case projections by the Internal Revenue Service which are arbitrary, capricious and without foundation in fact in violation of a taxpayer's due process and equal protection rights.

## **STATEMENT OF THE CASE**

Petitioner, JOHN F. QUINN, entered into the book-making business in Omaha, Nebraska during the year 1951. His activities in this business continued from 1951 through 1964. From January of 1955 until August of 1961, the Petitioner timely filed wagering excise tax returns with the

District Director of the Internal Revenue Service in Omaha, Nebraska, reflecting his wagering activities for these specific periods.

During the year 1958, Petitioner was contacted by the Internal Revenue Service for an audit of his tax returns for the years 1955, 1956 and 1957 and was requested to present his wagering tax records for examination by the Internal Revenue Service. Petitioner contacted an attorney to discuss this pending audit. After a review of Petitioner's records by this attorney, he was advised that the records that QUINN had in his possession were not acceptable by the Internal Revenue Service because they only showed the date and the gross wagers accepted by Petitioner. Petitioner was further advised to prepare more elaborate records showing specific events wagered upon and amounts involved in those wagers. In compliance with this advice, Petitioner prepared false records, attempting to comply with what he believed to be the record requirements of the Internal Revenue Service.

These false records were delivered to the Internal Revenue Service and Petitioner was subsequently indicted under 18 U.S.C. §1001 for giving false records to a federal officer. Petitioner pled guilty to that offense and was placed on probation.

In 1967, the Internal Revenue Service, using the false records submitted by Petitioner and some other minor third party information, projected wagering tax assessments against the Petitioner in substantial amounts.

In 1972, Petitioner filed separate claims for refund and abatement of the taxes for each of the 77 monthly taxable periods involved in the assessments. A partial payment accompanied each claim for refund. These claims for

refunds were disallowed and Petitioner filed his suit for refund which is the subject matter of this Petition for Certiorari.

At the trial of this case, Petitioner testified extensively regarding his bookmaking activities between 1955 and 1961. He carefully and clearly outlined to the Court the type of records that he kept to prepare his federal wagering excise tax returns and concluded his testimony by stating that the forms he filed accurately reflected all the wagers placed with him during the covered periods. In opposition to this testimony, the Government presented its projections for the period under review and the basis for said projections. There were two separate projection approaches used for the periods in question.

The projections which form the basis for the assessments for 1955 through 1957 were prepared by an agent by first using the false records submitted by QUINN. Based upon this projection, the Internal Revenue Service determined that Petitioner averaged approximately \$773.00 per day in horse racing bets accepted. These admitted false records which were fabricated by QUINN based on erroneous legal advice were used by the Internal Revenue Service to determine the extent of Petitioner's under reporting of horse racing bets for the monthly periods of January, 1955 through December of 1957. The Internal Revenue Service next estimated that Petitioner accepted certain amounts of wagers on football and baseball on a daily basis. Upon cross-examination, the Internal Revenue Service involved admitted that the Government had no proof that Petitioner was even involved in receiving any wagers for baseball or football during the years 1955 through 1957.

The second projection which was used for the basis of assessments from 1958 through 1971 was, based upon the

testimony of Internal Revenue Service agents, based solely on statements and telephone records submitted by Internal Revenue Service special agents. Further, the information used to make this projection was based solely on information received regarding Petitioner for part of the years 1960 and 1961. The Internal Revenue Service used this information to project backwards to 1958 and 1959. The Internal Revenue Service agent auditing Petitioner's returns admitted that he did not consider the records and returns filed by Mr. QUINN in arriving at his projections.

The District Court after hearing the evidence in this case dismissed Petitioner's action with prejudice and granted the Government's counterclaim in the amount of \$286,371.82 plus interest.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's findings and found that the false records submitted by Petitioner were a true and accurate record of wagering activities during an 80 day period of a year other than the year under audit. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Ninth Circuit on October 10, 1978.



## REASON FOR GRANTING THE WRIT

### I.

#### THE PROJECTIONS USED IN THIS CASE BY THE GOVERNMENT WERE ARBI- TRARY, CAPRICIOUS AND WITHOUT FOUNDATION IN FACT.

The tax assessment against Petitioner which covers a period of 77 months is based upon projections which are arbitrary, capricious and without foundation in fact. Such assessments made by the Internal Revenue Service have consistently been held to be invalid and are not to be accorded the usual presumption of correctness. Further, if the determination has no rational foundation and is not based upon assumptions which can be supported, the taxpayer has no burden of proving the correct amount of tax due and owing. *Helvering v. Taylor*, 293 U.S. 507 (1935) and *Welch v. Commissioner*, 297 F.2d 309 (4th Cir., 1961).

In *Lucia v. United States*, 474 F.2d 565 (5th Cir., 1973), the Court remanded the case to the District Court to determine whether the Government could make a sufficient showing to support its assessment of wagering excise taxes. Among the Court's directions was to ask the Lower Court to determine whether or not the Government's figures were based on realistic projections or merely derived, mandrake-like, from a filament of evidence and subjected to a slight of hand computation. The Court, on page 575, footnote 42, in discussing the use of projections indicated that the failure of the taxpayer to keep records in light of self-incrimination problems will not bar the taxpayer from overcoming an

assessment that is arbitrary and capricious:

"Although Pinder partially rationalized the use of the projection method on the ground that the taxpayer failed to keep records required by §4403 and §4423, a rational probably abrogated by Marchetti and Grosso, Pinder is not authority for defending a projection that is arbitrary, capricious and without factual foundation."

*Pizzarello v. United States*, 408 F.2d 579 (2nd Cir., 1969) is a similar case which the Court seriously questioned the use by the Government of projections and estimations based upon limited records. Its concern was eloquently expressed on page 584 of the decision:

"Moreover, while we recognize the difficulties faced treasury agents and the need to estimate in situations of this nature, wagers received on three consecutive days can hardly be said to be representative of wagers received over a five year period, even assuming Pizzarello accepted wagers for as long as the Government contends."

A close look at the method of computation employed by the Government in this case shows clearly and convincingly that the methods are arbitrary, capricious and without factual foundation. The methods in fact do not even rise near the evidence available in *Pizzarello, supra* which was rejected by the Circuit Court. For the period between January, 1955 and December, 1957, the Internal Revenue Service admitted that the basic source for their additional assessment was the use of the false records submitted by Petitioner. The Internal Revenue Service admitted that they knew that these records were false in that they represented 1957 horse racing results but were purported to be for 1955 and 1956. In fact, under cross-examination, the Internal Revenue Service agent handling the matter admitted that

the records were incorrect but that he assumed for projection periods that they were the Petitioner's records for 1957. The Internal Revenue Service used these false records which Petitioner admits were fabricated and picked out of random to project horse racing activity for a three year period. At this point, we have the Government admitting that their projections were based upon fictitious records. Under *Pizzarello*, the Court seriously questioned the use by the Government of projections and estimates based on limited records of the taxpayers. In this case, we have the Government using records that are false and in effect no records at all to make arbitrary and capricious projections. The balance of the 1955 through 1957 projections involve football and baseball wagers and were in fact admitted by the Internal Revenue Service to be based upon mere supposition and not based upon any records at all.

If ever there was a case in which the Internal Revenue Service's determination was arbitrary, capricious and unreasonable it would be this case. Projections using admittedly false and inaccurate records along with mere assumptions as to other gambling activities must be found by any court to be invalid and unenforceable. To allow the Government to base a case and present this evidence as part of its case certainly violates the due process and equal protection rights that a taxpayer has under the constitutional protections of this country.

## CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted:

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*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this 16th day of November, 1978, postage prepaid, to the Honorable Wade H. McCree, Jr., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

## APPENDIX A

FILED

OCT 10 1978

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUITEMIL E. MELFI, JR.  
CLERK, U.S. COURT OF APPEALS

JOHN F. QUINN,	)	No. 76-1430
	)	ORDER
Plaintiff-Appellant,	)	DENYING
	)	PETITION
vs.	)	FOR
	)	REHEARING
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: CHAMBERS, KILKENNY and TANG, Circuit  
Judges.

The panel as constituted above has voted to deny the  
petition for rehearing.

The full court has been advised of the suggestion for  
rehearing en banc and no judge of the court has requested a  
vote on the suggestion for rehearing en banc. Fed. R. App. P.  
15(b).

The petition for rehearing is denied and the suggestion for  
rehearing en banc is rejected.



FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT AUG 15 1973

JOHN F. QUINN,	)	
	)	EMIL E. MELFI, JR.
Plaintiff-Appellant,	)	CLERK, U.S. COURT OF APPEALS
	)	No. 76-1430
vs.	)	
	)	MEMORAN-
	)	DUM AFFIRM-
UNITED STATES OF AMERICA,	)	ING
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court for the District  
of Nevada

Before: CHAMBERS, KILKENNY and TANG, Circuit  
Judges.

The taxpayer appeals from a judgment dismissing his suit for refund of wagering taxes paid and granting the government the full amount of its counterclaim. We affirm.

From January 1, 1955 through August 31, 1961, Quinn accepted wagers on horse races and other sporting events in Nebraska. Internal revenue agents audited Quinn's income tax returns for 1955 and 1956. They asked Quinn to furnish records substantiating his deductions from wagering income. In an attempt to comply, Quinn submitted false documents to the agents. He pleaded guilty to that charge in 1961. Agents determined that these documents represented Quinn's wagering activity during an 80-day period in 1957 rather

than his activity in 1955 and 1956. Using this information, agents projected Quinn's gross wagering receipts for the period from January 1, 1955 until August 31, 1961. The Commissioner determined that Quinn had substantially underrepresented his wagering income on his required tax returns and assessed a deficiency. Quinn filed separate claims for refund, including with each claim \$10 as a partial payment of the proposed deficiency. He brought suit after the Commissioner denied his refund claim.<sup>1</sup> The district court dismissed his suit, granting the government's counterclaim for the balance of the assessment. Quinn appeals.

Quinn argues that the tax assessment lacked a factual foundation. He maintains that the Commissioner could not rely on the documents he submitted because they were admittedly false. We disagree. The district court found that the documents painted a clear picture of Quinn's wagering activity for an 80-day period. The record supports this finding. In addition to testimony from the agents who prepared the estimate, the court heard testimony from employees and a client of Quinn's. The estimate is "rationally based and presumptively correct." *Avery v. Commissioner*, 574 F.2d 467, 468 (9th Cir. 1978). Quinn presented no evidence to overcome the presumption.

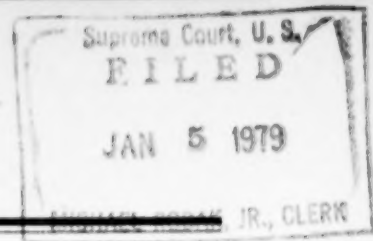
Quinn also contends that the government failed to establish fraud. Therefore, the assessments are barred by the

<sup>1</sup>As a general rule, a district court has jurisdiction of a suit for refund only if the taxpayer has paid the full assessment, 28 U.S.C. § 1346(a)(1). Excise tax deficiencies, however, are divisible into a tax on each transaction or event. *Flora v. United States*, 362 U.S. 145, 171 n. 37, 175 n. 38 (1960); *Boynton v. United States*, 566 F.2d 50 (9th Cir. 1977). The partial payments represented the tax due on at least one wager during each month. The district court had jurisdiction. *Higginbotham v. United States*, 556 F.2d 1173, 1174 n. 1 (4th Cir. 1977).

statute of limitations. The district court concluded that Quinn had committed fraud, finding that he failed to maintain adequate records, consistently understated his gross receipts from wagers, and admittedly filed false and misleading statements with the IRS. The record supports the district court.

**AFFIRMED.**

No. 78-771



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**In the Supreme Court of the United States**  
OCTOBER TERM, 1978

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JOHN F. QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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No. 78-771

JOHN F. QUINN, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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Petitioner seeks review of the dismissal of his refund suit for federal wagering taxes and the judgment in favor of the government's counterclaim for such taxes plus fraud penalties and interest.

The pertinent facts are as follows: Petitioner is a professional gambler who accepted wages on horse races and other sporting events from January 1, 1955 through August 31, 1961 (Pet. App. 2a; Ap-

pendix, *infra*, 1a).<sup>1</sup> During that period, petitioner filed monthly wagering tax returns (Forms 730) (Appendix, *infra*, 2a). When the Internal Revenue Service audited petitioner's income tax returns for 1955 and 1956, it requested him to furnish records substantiating his deductions from wagering income. In response to this request, petitioner furnished documents purporting to relate to gambling activities for the entire two-year period under examination (Pet. App. 2a). However, a comparison made by the Internal Revenue Service between the information contained in the documents supplied by petitioner and data of actual races run over an extended period of time revealed that the documents covered petitioner's receipts and disbursements for a different period of 80 racing days from February 15, 1957 to May 18, 1957 (Pet. App. 2a-3a; Appendix, *infra*, 2a-3a). As a result, petitioner was charged with and pleaded guilty to the offense of submitting false documents to the Internal Revenue Service (Pet. App. 2a).

The Commissioner of Internal Revenue thereafter used the documents furnished by petitioner to determine his wagering tax liability for 1955-1957. Starting with the average daily wagers on horse races of \$773.60 during the 80-day period covered by the documents, the Commissioner projected petitioner's daily average for the entire period 1955-1957. The Commissioner also estimated petitioner's wagers on baseball games at \$100 per day and football games at

<sup>1</sup> The district court's findings of fact and conclusions of law are set forth in the Appendix, *infra*.

\$500 per week. The Commissioner's projections and estimates yielded an assessment of additional wagering taxes, penalties and interest of \$133,292.65 for 1955-1957 (Appendix, *infra*, 2a; Pet. App. 3a).

For the period 1958 to August 31, 1961, the Commissioner computed petitioner's wagers on the basis of information obtained from bettors, employees and telephone records (Appendix, *infra*, 4a). These computations yielded an assessment for additional wagering taxes, penalties and interest of \$171,918.78 (Appendix, *infra*, 2a). Petitioner made partial payment of the assessments and filed claims for refund. Upon the Service's denial of his refund claims, petitioner instituted this action in the United States District Court for the District of Nevada. The government thereafter counterclaimed for the total unpaid assessments. The district court entered judgment for the government on both the complaint and counterclaim and the court of appeals affirmed (Pet. App. 1a-4a).

Petitioner argues (Pet. 6-8) that the Internal Revenue Service's projection of his wagering income was invalid because it was based upon his false documents. But as the courts below correctly recognized, petitioner's records were not false in the sense that they were inaccurate but were false only because petitioner submitted them as a summary of his wagering activities over a two-year period. It was clearly established at trial that what petitioner had presented were his actual records of wagers on horse races covering a period of 80 racing days at specified tracks for the period February 15, 1957 to May 18,



1957. From these records, the Internal Revenue Service projected his wagers for 1955-1957.<sup>2</sup> There is accordingly no basis to petitioner's claim that the Commissioner's assessments were based upon false documents.

Contrary to petitioner's further argument (Pet. 6-7), the decision below does not conflict with either *Lucia v. United States*, 474 F.2d 565 (5th Cir. 1973) (en banc), or *Pizzarello v. United States*, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969). In *Lucia*, the court remanded the case to the district court in order to give the taxpayer the opportunity to prove that the government's projection was improper. But the court did not, as petitioner suggests, hold that such projections are arbitrary as a matter of law. See *United States v. Janis*, 428 U.S. 433, 436-437 (1976). Here, unlike *Lucia*, petitioner has never argued that the government's projections are inaccurate.

*Pizzarello* is similarly distinguishable. There, the court disapproved an extrapolation of three days of gambling activity over a five-year period. But unlike the instant case, the taxpayer in *Pizzarello* disputed that he was engaged in gambling during the period at issue. Indeed, in a case subsequent to *Pizzarello* where the court upheld a similar extrapolation, the Second Circuit distinguished *Pizzarello* in part on the

<sup>2</sup> The court of appeals apparently assumed that the projection was used through August 31, 1961 (Pet. App. 3a). However, the findings of the district court correctly point out that the projection was limited to the period 1955-1957. See Appendix, *infra*, 3a.

ground that there was a failure of proof that the taxpayer in that case had accepted wagers over the five-year period alleged. *Hamilton v. United States*, 309 F. Supp. 468, 473 (S.D. N.Y. 1969), aff'd *per curiam*, 429 F.2d 427 (2d Cir. 1970), cert. denied, 401 U.S. 913 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
Solicitor General

JANUARY 1979

APPENDIX

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \* \*

[Filed Jan. 12, 1976]

Civil LV 1826

JOHN F. QUINN, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The oral decision of the Court rendered at the conclusion of the trial is hereby made a part of the Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is a civil action for the refund of wagering excise taxes, penalties, and interest paid by the plaintiff for the period January 1, 1955 through August 31, 1961, except for the months of November and December, 1955 and July, 1956, in the amount of \$770 plus interest. The defendant has counter-claimed for the remaining unpaid balance of \$286,-371.82 plus interest which remains due on the assessment.

2. John F. Quinn (hereinafter referred to as the plaintiff), at the time this action was brought, was

a resident of Las Vegas, Nevada. During the taxable periods in issue, the plaintiff was a resident of Omaha, Nebraska, and during the period was there engaged in the business of accepting wagers.

3. The plaintiff filed Wagering Tax Returns (Forms 730) monthly for the periods shown above and paid the sums shown thereon.

4. On June 9, 1967, additional assessments were made as follows:

	1955-1957	1958-August, 1961
Tax assessment	\$ 61,998.49	\$ 88,211.94
50 percent fraud penalty	31,256.61	44,106.09
Interest	40,037.55	39,600.75
<b>TOTAL</b>	<b>\$133,292.65</b>	<b>\$171,918.78</b>

5. On March 31, 1972, the plaintiff filed separate claims for refund and abatement of the taxes for each of the 77 monthly taxable periods involved in this action. Each claim for refund was accompanied by a check for \$10 as partial payment of the outstanding deficiency for each period.

6. On April 25, 1972, the claims for refund were disallowed. This action was filed on May 17, 1972. The defendant counterclaimed for unpaid taxes, penalties and interest in the amount of \$286,371.82 for the periods January, 1955 through October, 1955, January, 1956 through June, 1956 and August, 1956 through August, 1961.

7. On September 8, 1958, the plaintiff voluntarily gave to an agent of the Internal Revenue Service,

wagering records purported to substantiate wagers received during the years 1955 and 1956.

8. These records, called "In" and "Out" sheets were submitted to establish the excise tax paid for the years 1955 and 1956 and showed the individual horse race wagers and amounts paid out to patrons on winnings.

9. Upon analysis of these "In" and "Out" sheets, which were represented by the plaintiff as showing the wagers received for the years 1955 and 1956, it was determined by the agents that they were actually records of wagers on horse races actually run on specified tracks for the period February 15, 1957 to May 18, 1957, a total of 80 days, rather than for the years 1955 and 1956. The total of the wagers made for this period divided by the 80 days of actual racing, results in an average wager of \$773.60 per day. This figure, computed from 80 racing days was then projected over the number of racing days the plaintiff was engaged in accepting wagers during 1955, 1956 and 1957 to arrive at a total tax of \$61,998.49 for this period.

10. The gross wagers for 80 days determined and projected by the agents for this period is reasonable. *Pinder v. United States*, 330 F. 2d 119 (C.A. 5, 1964); *Mersel v. United States*, 420 F. 2d 517 (C.A. 5, 1969); *Washington v. United States*, 402 F. 2d 3 (C.A. 4, 1968); *Hamilton v. United States*, 309 F. Supp. 468 (S.D.N.Y., 1969).

11. Wagers placed on baseball games were estimated and included at \$100 per day during the season.

12. Football wagers were estimated and included at \$500 for each weekend during the season.

13. On January 31, 1961, an indictment was returned by the Grand Jury charging the plaintiff with making "false, fictitious and fraudulent statements" on the basis of the "In" and "Out" sheets submitted by the plaintiff. The plaintiff entered a plea of "guilty" to this charge on April 6, 1961.

14. For the years 1958, 1959, 1960, up to and including August 31, 1961, a computation of the wagers received by the plaintiff was prepared by the Internal Revenue Service based upon information obtained from bettors, employees, and telephone records.

15. No records were supplied by the plaintiff at the time of the examination except the "In" and "Out" sheets.

16. On the basis of this testimony and records, an additional assessment of taxes, penalties and interest was made for the period 1958 to August 1961, in the amount of \$171,918.78.

### CONCLUSIONS OF LAW

1. This Court has jurisdiction of the action and the parties under Title 28 U.S.C., Section 1346(a) (1).

2. Section 4401 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that a person who is engaged in the business of accepting wagers is liable

for an excise tax based upon ten percent of the gross wagers.

3. The tax imposed by Section 4401 of the Internal Revenue Code of 1954 (26 U.S.C.) is constitutional and was not rendered unconstitutional by the decisions of the United States Supreme Court in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968). *Washington v. United States*, 402 F.2d 3 (C.A. 4, 1968), cert. denied, 402 U.S. 978 (1971).

4. The assessment of additional taxes for the periods involved was not barred by the statute of limitations under the provisions of the Internal Revenue Code of 1954 which deal with civil fraud. Sections 6501(c)(1) and 6501(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.). The requisite proof of civil fraud is provided by evidence that:

(a) The plaintiff failed to maintain adequate records of his wagering activities, *Spies v. United States*, 317 U.S. 492 (1943).

(b) The plaintiff consistently understated his gross wagers over a period of years, *Holland v. United States*, 348 U.S. 121 (1954).

(c) Plaintiff admittedly filed false and misleading statements with agents of the Internal Revenue Service, *United States v. Beacon Brass Co.*, 344 U.S. 43 (1952).

5. The assessment of an additional tax of 50 percent due to fraud pursuant to Section 6653(b) of the Code (26 U.S.C.) is of a remedial character and not



in the nature of a penal assessment, *Helvering v. Mitchell*, 303 U.S. 391 (1938).

6. The Commissioner's determination of the gross amount of wagers accepted by the plaintiff is presumed to be correct and plaintiff has the burden of proving error in the Commissioner's determination. Inasmuch as plaintiff has failed to produce records or other evidence from which a correct assessment could be made, he has not satisfied his burden of proof and the Commissioner's determination of the gross amount of wagers is deemed to be correct. *Lewis v. Reynolds*, 384 U.S. 281 (1932); *Helvering v. Taylor*, 293 U.S. 507, 514 (1935).

7. The requirement that it is the burden of the plaintiff to prove the incorrectness of the tax assessed in a gambling excise tax case does not violate the privilege against self-incrimination. *United States v. Donlon*, 355 F.Supp. 220 (Del., 1973), aff'd 487 F.2d 1395 (C.A. 3, 1973); *Higginbotham v. United States*, 491 F.2d 432 (1974).

8. This Court is without jurisdiction to abate assessed and unpaid taxes, penalties and interest. Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.), *Grain Belt Transportation Co. v. United States*, 70-1 U.S.T.C. par. 15, 940 (Kan., April 16, 1970), *Etheridge v. United States*, 300 F.2d 906 (C.A. D.C., 1962).

9. Any findings of fact deemed or properly constituting a conclusion of law hereby is adopted as a conclusion of law.

10. Plaintiff's complaint for refund of Internal Revenue Taxes in this action should be dismissed and defendant shall have judgment on its counterclaim in the amount of \$286,371.82 plus interest as provided by law, together with its costs.

DATED: January 12, 1976

/s/ George H. Boldt  
United States District Judge

Receipt of the foregoing is acknowledged this — day of January, 1976, and is APPROVED AS TO FORM AND CONTENT:

---

GOODMAN & SNYDER

Submitted by:

/s/ Harold S. Larsen  
HAROLD S. LARSEN  
Attorney  
Tax Division  
Department of Justice

I hereby attest and certify on 1-22-76 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

JOHN A. PORTER  
Clerk, U. S. District Court  
District of Nevada

By /s/ Linda Shaw  
Deputy